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Editor-in-Chief: Karl P. Sauvant (Karl.Sauvant@law.columbia.edu)

Managing Editor: Matthew Schroth (mas2443@columbia.edu)

Europe's new investment policy faces an uncertain future[*]

by

Guillaume Beaumier and Richard Ouellet[**]

A thorough analysis of the recent European Union (EU) free trade agreements (FTAs) with Singapore (2015), Canada (2016) and Vietnam (2016) allows us finally to grasp the impact of the Lisbon Treaty[1] on the development of a unified European investment policy. As the EU's member states are signatories to almost half of the world's 3,000 international investment agreements (IIAs), the investment treaty model being developed by the European Commission (EC) could significantly influence international investment law.

Rather than replicating the traditional "gold standard" of European IIAs, the EC has effectively developed a much more complex and elaborate model. Nevertheless, the investment chapters in the three FTAs show few genuine legal innovations, in that most of their standards can be traced back to past IIAs, case law or other international rules. The inclusion of a WTO "market liberalization" approach is unprecedented.

In sharp contrast to IIAs historically signed by EU member states, the EC has embraced comprehensive pre-establishment guarantees. This is especially striking given that the absence of pre-establishment protection was a lasting difference between European and US IIAs. The EC however went further than any past IIA by developing a market-access provision stipulating that no numerical limitations shall be imposed on the number of enterprises that may carry out an economic activity, or on the total value of assets that can be moved. While some exceptions exist, that means that an EU trade partner cannot limit the number of investors or the amount of foreign money entering its market. Such rule is directly inspired by WTO law.[2]

This unexpected linkage between trade and investment law appears to be an indirect result of the singular EU integration process. Before the Lisbon Treaty, at a time when it only had competence over trade policy, the EC decided to develop its own investment policy through the negotiation of norms on the establishment of service providers. As such, the "minimum platform on investment for EU FTAs"[3] which represented the *de facto* model for EU investment agreements pre-Lisbon was greatly influenced by previous negotiations on market access for services.

As the EC is actively negotiating IIAs with major trading partners (e.g., China, India, Japan, the US), the impact of this new approach should not be underestimated. While states have integrated many investor protections in their IIA practice throughout the years, many still restrict the entry of foreign investment. Furthermore, European states are genuinely more open than most countries and stand to gain much from this approach, most notably in the context of current IIA negotiations with China (which imposes various entry restrictions).[4]

Interestingly, the EC has carved out the use of investor-state dispute settlement for violations of these new guarantees on market access. This shows that the EC distinguishes pre-establishment guarantees from post-establishment protections given to foreign investors (e.g., fair and equitable treatment). This reflects the US practice, but more importantly it is consistent with a trade approach where norms on establishment are concessions made between sovereign states. In practical terms, though, this means that the enforceability of the EC's approach will depend on the goodwill of governments to bring complaints through state-to-state dispute-settlement mechanisms.

With "Brexit" set to reshape the EU, it remains to be seen what will become of the new European investment policy. On the one hand, its impact may be slight, given that the EC appears more influenced by norms emanating from international institutions (e.g., the WTO) or from non-European IIAs.[5] On the other hand, it could lead the EC to be more receptive to the views of individual member states. Although it is questionable that such an outcome would cause a resurgence of the old "gold standard," greater involvement by member states could create new hurdles. In the days following Britain's referendum, the EC's decision (reluctantly) to ratify the FTA with Canada as a mixed agreement[6] is one such example. While this might ease the EC's relationship with EU member states wary of ceding too much sovereignty, the rising anti-trade rhetoric in some member states could make the ratification of this FTA (and others) impossible. The Wallonia crisis may not be an isolated event. If so, the outlook for a unified European investment policy would be bleak.

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[**] Guillaume Beaumier (guillaume.b-beaumier.1@ulaval.ca) is a Ph.D. Candidate at Université Laval and a member of the Canada Research Chair in International Political Economy; Richard Ouellet (Richard.Ouellet@fd.ulaval.ca) is a full-time professor of international economic law at Université Laval. The authors are grateful to Marc Bungenberg, Catherine Kessedjian and August Reinisch for their helpful peer reviews.

[1] The Lisbon treaty (2007) gave competence over investment policy to the European Commission: *Treaty on the Functioning of the European Union* (2007), Art. 207. In a recent decision (C-2/15), the European Court of Justice clarified that this competence is however not exclusive. New FTAs with investment chapters will now need to be concluded by both the EU and its member states.

[2] *See, e.g.*, *General Agreement on Trade in Services* (1995), Art. XVI.

[3] Available at http://www.iisd.org/pdf/2006/itn_ecom.pdf.

[4] Wenhua Shan and Seng Zhang, "Market access provisions in the potential EU model BIT: towards a 'global BIT 2.0?'," *The Journal of World Investment & Trade*, vol. 15 (2014), p. 445.

[5] The "Mapping BITs" database (http://mappinginvestmenttreaties.com/) indicates that the treaties most similar to the recent EU investment chapters are US IIAs. It also confirms that market access provisions have no lineage in the IIA world.

[6] Mixed agreements require approval of both the EU and its member states.

For further information, including information regarding submission to the *Perspectives*, please contact:

Columbia Center on Sustainable Investment, Matthew Schroth, mas2443@columbia.edu.

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